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No. 88-1559

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

GLENPOOL UTILITY SERVICES AUTHORITY,
A Utility Trust,
Plaintiff-Petitioner,

v.

CREEK COUNTY RURAL WATER DISTRICT NO. 2,
Defendant-Third-Party-Plaintiff-Respondent,

and

JODY SWEETIN, an Individual,
Defendant-Intervenor,

v.

FARMERS HOME ADMINISTRATION, UNITED STATES DEPARTMENT OF AGRICULTURE, UNITED STATES OF AMERICA,
Third-Party-Defendants-Respondents.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

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STATEMENT OF THE CASE

Creek County Rural Water District No. 2 ("District No. 2") is a rural water provider and borrower from the Farmers Home Administration ("FmHA"). *Petition for Writ of Certiorari ("Petition")* at A15-A16. District No. 2 used the loan proceeds obtained from the FmHA for the construction of its rural water system. *Id.* Included within the territory of District No. 2 at the time it became indebted to FmHA was a geographic area now known as Eden South. *Id.* Eden South is a residential subdivision which was annexed into the City of Glenpool ("City") on January 4, 1983. *Petition* at A5.

Petitioner, Glenpool Utility Services Authority ("Glenpool"), began providing water service to Eden South after annexation by the City. *Petition* at A16. Both the City and Glenpool knew, at the time Eden South was annexed into the City, that Eden South was in the service territory of District No. 2. *Id.* Although Glenpool was itself an FmHA borrower at the time Eden South was annexed, it paid off its indebtedness prior to trial. *Petition* at A4.

Municipalities or other public bodies are forbidden by the provisions of 7 U.S.C. § 1926(b) from encroaching on the service territory of an FmHA borrower during the term of the FmHA loan. Both the District Court and the Court of Appeals held that District No. 2 came within the provisions of 7 U.S.C. § 1926(b). The Court of Appeals also held that District No. 2 was entitled to the statutory protection afforded to District No. 2's service area. *Petition* at A7-A8, A19. The District Court, however, refused

to enforce the exclusive right afforded District No. 2 by 7 U.S.C. § 1926(b) on the grounds that Oklahoma Constitution Article V, § 51 prohibits the Oklahoma legislature from passing a law granting an exclusive franchise to a corporation. *Petition* at A8-A9. An enabling act authorizing rural water districts to borrow from FmHA was passed by the Oklahoma legislature as Oklahoma Statute title 82, § 1324.10(14). The District Court concluded that enforcement of the rights afforded District No. 2 by the provisions of 7 U.S.C. § 1926(b) violated the Oklahoma Constitution. *Id.*

The District Court refused to enforce District No. 2's rights and denied District No. 2's request for declaratory relief that it had the exclusive right to serve Eden South. *Petition* at A9-AlO. District No. 2 appealed the denial of its request. *See Petition* at A17.

The United States Court of Appeals for the Tenth Circuit reversed that portion of the District Court's judgment which denied District No. 2 the exclusive right to serve Eden South. *Petition* at A25. The Court of Appeals found that Oklahoma's Constitution did not apply because federal law, not the Oklahoma legislature, created District No. 2's exclusive right. *Petition* at A23.

SUMMARY OF ARGUMENT

Neither of Glenpool's questions for review falls within the guidelines of Supreme Court Rule 17.1. The first question for review posed by the Petitioner only seeks review of the validity under Oklahoma's constitution of an

Oklahoma statute. No federal question is implicated or raised by the question as presented. Furthermore, the validity of the state statute under Oklahoma' s Constitution is moot since the Court of Appeals ruled that Congress, not Oklahoma's legislature, granted the exclusive rights afforded by 7 U.S.C. § 1926(b).

Glenpool's second question for review, as proposed by the Petitioner, merely asks this Court to determine whether Glenpool has the right to serve Eden South under 7 U.S.C. § 1926(b). Glenpool, however, did not appeal the District Court's judgment denying Glenpool such a right. Furthermore, the question of Glenpool's rights under 7 U.S.C. § 1926(b) is moot since Glenpool paid off and satisfied its FmHA loan prior to trial in the District Court.

ARGUMENT

I. Besides being moot, Glenpool's First Question as to the validity of Oklahoma Statute Title 82, § 1324.10 is a question of state law.

Glenpool asks this Court to consider whether Oklahoma Constitution Article V, § 51 invalidates Oklahoma Statute title 82, § 1324.10, the statute which authorized District No. 2 to borrow from FmHA. This question was never reached by the Tenth Circuit because it found that Congress, not the Oklahoma legislature, granted District No. 2's exclusive right to serve Eden South. *Petition* at A24, n.2. The question of whether Congress or the Oklahoma legislature granted District No. 2 its exclusive right has not been presented to this Court for review and, pur-

suant to Supreme Court Rule 17.1, should not be considered. There is, therefore, no reason to take up the moot issue of the validity of Oklahoma Statute title 82, § 1324.10 under Oklahoma's Constitution, since the outcome of this case turned entirely on the fact that Oklahoma's legislature did not grant the exclusive right.

Even if the first question posed by Glenpool were not moot, however, it does not fall within any of the categories set forth in Supreme Court Rule 17.1, which provides as follows:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

These categories all concern situations where review of a *federal* question is sought. Glenpool's first question of whether Oklahoma Statute title 82, § 1324.10 is valid under Oklahoma's Constitution is purely one of *state* law.

Glenpool argues, though, that it is "imperative that final decision be rendered regarding the application of State Constitutional Law as it affects the enabling statute of the State of Oklahoma." *Petition* at 6. Even if this statement were true, only Oklahoma's Supreme Court could render such a desired final decision. Although this Court, like any federal court, may consider questions of state law under *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938), its resolution of a state question is binding only on the parties. Oklahoma's state courts would have no obligation to follow this Court's pronouncement of the law of Oklahoma. *See Thompson v. Consolidated Gas Utilities Corporation,* 300 U.S. 55 (1937) (a decision of the United States Supreme Court involving a state statute which has not been interpreted by a state court disposes of the particular case but cannot settle the issue of proper construction of the statute).

The same would hold true in any other state, if any, that has a constitutional provision similar to Oklahoma Constitution Article V, § 51. Consequently, none of the

"special and important reasons" required under Supreme Court Rule 17.1 for granting a Petition for Writ of Certiorari exist in this case.

II. Besides being moot, Glenpool's Second Question for review was not raised on appeal.

Glenpool's second question for review essentially asks this Court to review whether Glenpool should have any rights under 7 U.S.C. § 1926(b) to serve Eden South since it was also an FmHA borrower at the time it annexed the housing addition. Both parties originally sought declaratory relief in the District Court, but the District Court held that neither Glenpool nor District No. 2 had the exclusive right to serve Eden South. Glenpool did not seek reversal of that part of the judgment denying its request for declaratory judgment. Glenpool's second question for review, therefore, was not raised on appeal and is thus not subject to review by this Court. *Ellis v. Dixon*, 349 U.S. 458 (1955).

However, even if the second question had been raised on appeal, it is now moot. The Petitioner' s second question suggests that being an FmHA borrower affords a municipality protection under 7 U.S.C. § 1926(b) so as to allow it to raid with impunity a rural water district's territory. Regardless of any merit of such a proposition, which District No. 2 believes is entirely lacking, the fact remains that Glenpool was not an FmHA borrower at the time of trial. *Petition* at 4. The protection provided by 7 U.S.C.§ 1926(b) exists only "during the term of such loan." Because the term of Glenpool's FmHA loan had

ended, whatever rights might have been afforded Petitioner by 7 U.S.C. § 1926(b) no longer existed.

CONCLUSION

For the reasons set forth above, this Court should deny Glenpool's Petition for Writ of Certiorari to the United States Court of Appeals, Tenth Circuit.

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